

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Amendment to the Commission's Rules) WT Docket No. 95-157
Regarding a Plan for Sharing) RM-8643
the Costs of Microwave Relocation)

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

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By the Commission:

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I. INTRODUCTION

1. In this Memorandum Opinion and Order on Reconsideration (*MO&O*), we address petitions for reconsideration and/or clarification of, and a petition for declaratory ruling concerning, the Commission's rules governing the relocation of microwave facilities from the 1850-1990 Megahertz (MHz) band.¹ We clarify certain aspects of these rules, as discussed below, and deny the remaining requests in the petitions.

II. BACKGROUND

2. In 1992, the Commission reserved 220 MHz of spectrum, including the 1850-1990 MHz band, for reallocation from private and common carrier fixed microwave services (microwave incumbents) to services using emerging technologies.² The Commission also established procedures for microwave incumbents to be relocated to available frequencies in higher bands or to other media, including procedures governing the compensation of microwave incumbents by providers of emerging technology services.³ In 1994, the Commission allocated the 1850-1990 MHz band to Personal Communications Services (PCS), one of the emerging technology services.⁴ This allocation included 20 MHz of spectrum, in the 1910-1930 MHz range, for unlicensed PCS devices.⁵

3. In the *First Report and Order* in this proceeding, the Commission changed and clarified certain aspects of its microwave relocation procedures and adopted a plan for sharing the costs of relocating microwave facilities operating in the 1850-1990 MHz band (the "cost-sharing plan").⁶ Under the Commission's cost-sharing plan, PCS licensees and manufacturers of unlicensed PCS devices that incur costs for relocating an interfering microwave link (together, "PCS relocators") are eligible to receive reimbursement from later-entrant PCS licensees and later-entrant manufacturers of unlicensed PCS devices that benefit from the clearing of their spectrum (together, "later-entrant PCS entities").⁷ The cost-sharing plan is administered by two

¹ See Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation, WT Docket No. 95-157, RM-8643, *First Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 8825 (1996) (*First Report and Order*), *Second Report and Order*, 12 FCC Rcd 2705 (1997) (*Second Report and Order*). See also 47 C.F.R. §§ 24.239 - 24.253; 47 C.F.R. §§ 101.69 - 101.81.

² See Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies, ET Docket No. 92-9, RM-7981 and RM-8004, *First Report and Order and Third Notice of Proposed Rulemaking*,⁷ FCC Rcd 6886 (1992) (*Emerging Technologies First Report and Order*).

³ See *id.* See also Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies, ET Docket No. 92-9, RM-7981 and RM-8004, *Third Report and Order and Memorandum Opinion and Order*, 8 FCC Rcd 6589 (1993), *Memorandum Opinion and Order*, 9 FCC Rcd 1943 (1994).

⁴ See Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314, RM-7140, RM-7175, RM-7618, *Memorandum Opinion and Order*, 9 FCC Rcd 4957 (1994).

⁵ See *id.* at 4990-91, ¶¶ 84-87. See also 47 C.F.R. §§ 15.301 - 15.323. The Commission subsequently designated the Unlicensed PCS Ad Hoc Committee for 2 GHz Microwave Transition and Management ("UTAM") to coordinate relocation in the 1910-1930 MHz band. See Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314, *Fourth Memorandum Opinion and Order*, 10 FCC Rcd 7955 (1995).

⁶ See *First Report and Order*, 11 FCC Rcd 8825.

⁷ See *id.* at 8861-67, ¶¶ 71-85.

private clearinghouses designated by the Wireless Telecommunications Bureau (Bureau) -- the Personal Communications Industry Association (PCIA) and the Industrial Telecommunications Association, Inc. (ITA)⁸ -- using the cost-sharing formula adopted by the Commission.⁹ In the *Second Report and Order* in this proceeding, the Commission, among other things, modified its cost-sharing rules to permit microwave incumbents who relocate their own microwave links and pay their own relocation expenses ("self-relocating microwave incumbents") to collect reimbursement in accordance with the cost-sharing plan adopted in the *First Report and Order*, subject to certain conditions.¹⁰

4. Ten parties filed petitions for reconsideration and/or clarification of the *First Report and Order*,¹¹ one party filed a petition for declaratory ruling concerning the *First Report and Order*,¹² and three parties filed petitions for reconsideration and/or clarification of the *Second Report and Order*.¹³ In addition, we received and have considered a number of *ex parte* communications in this proceeding, although we do not list them individually. In this *MO&O*, we deny the petitions for reconsideration and/or clarification and the petition for declaratory ruling of the *First Report and Order*, and we grant in part and deny in part petitions for reconsideration and/or clarification of the *Second Report and Order*.

⁸ See Amendment of the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation, WT Docket No. 95-157, *Memorandum Opinion and Order*, 11 FCC Rcd 9394 (Wir. Tel. Bur. 1996) (*Memorandum Opinion and Order*). We note that one party requested that the Commission take certain actions to facilitate the provision of advance notice from the clearinghouses to C block licensees of their potential reimbursement obligations resulting from earlier relocations funded by A and B block licensees. See Letter from Sylvia Lesse to the Commission's Commercial Wireless Division, dated July 28, 1997. Several parties filed comments on this issue. We believe that the record on this issue has become stale since the letter and comments were filed, and we have no indication that this continues to be a live issue. Accordingly, we decline to take action on this issue at this time.

⁹ See *First Report and Order*, 11 FCC Rcd at 8878, Appendix A at ¶ 3; 47 C.F.R. § 24.243.

¹⁰ See *Second Report and Order*, 12 FCC Rcd 2717-18, ¶¶ 25-28. The Commission sought comment on this issue in the *First Report and Order*, 11 FCC Rcd at 8871-72, ¶¶ 98-99.

¹¹ Parties filing petitions for reconsideration and/or clarification of the *First Report and Order* are as follows: (1) American Petroleum Institute (API); (2) Association of American Railroads; (3) Association of Public-Safety Communications Officials-International, Inc. (APCO); (4) AT&T Wireless Services, Inc., GTE Mobilnet, PCS PrimeCo, L.P., Pocket Communications, Inc., Western PCS Corporation, and Cellular Telecommunications Industry Association (AT&T et al.); (5) Celsat America, Inc., COMSAT Corporation, Hughes Space and Communications International, ICO Global Communications, and Personal Communications Satellite Corporation (collectively, the MSS Coalition); (6) Omnipoint Communications, Inc. (Omnipoint); (7) Personal Communications Industry Association (PCIA); (8) Small Business in Telecommunications; (9) Tenneco Energy; and (10) UTC, The Telecommunications Association (UTC). All petitions were received on July 12, 1996, except for the petition of Small Business in Telecommunications, which was received on May 28, 1996. See Appendix A for a complete list of parties filing petitions, comments, and replies.

¹² Petition For Declaratory Ruling filed by Powertel PCS, Inc., Sept. 26, 1997. See also Response filed by PCIA Microwave Clearinghouse, Oct. 24, 1997; Appendix A.

¹³ Parties filing petitions for reconsideration and/or clarification of the *Second Report and Order* are as follows: (1) API; (2) UTC; and (3) the South Carolina Public Service Authority (Santee Cooper). Petitions by Santee Cooper and UTC were received on April 17, 1997, and the petition by API was received on April 16, 1997. See Appendix A for a complete list of parties filing petitions, comments, and replies.

III. DISCUSSION

A. Petitions Concerning the *First Report and Order*

1. Background

5. The MSS Coalition filed a petition seeking clarification that the cost-sharing rules adopted in the *First Report and Order* do not apply to mobile-satellite service providers in the 2 Gigahertz (GHz) band.¹⁴ A number of parties also filed petitions for reconsideration of various cost-sharing rules adopted in the *First Report and Order*.¹⁵ In addition, AT&T Wireless Services, in combination with a number of other wireless providers, filed a petition for reconsideration or, in the alternative, for rulemaking, regarding the Commission's decision not to address in the *First Report and Order* certain involuntary relocation procedures recommended by these providers.¹⁶ Furthermore, Powertel PCS, Inc. (Powertel), a PCS "A" block licensee that received notification that it owes reimbursement to a PCS relocater, filed a petition seeking a declaratory ruling that no cost-sharing obligation is owed for the relocation of a microwave incumbent's link that is wholly outside of a PCS licensee's Major Trading Area (MTA) or Basic Trading Area (BTA).¹⁷

2. Discussion

6. MSS Coalition Petition for Clarification. We find it unnecessary to reconsider or clarify the Commission's microwave relocation rules for the non-PCS emerging technology bands and the cost-sharing rules adopted in the *First Report and Order* as they apply to 2 GHz mobile-satellite service providers, as urged by the MSS Coalition.¹⁸ In the *First Report and Order*, the Commission stated that the "microwave relocation rules already apply to all emerging technology services" but that "as new services develop, we may review our relocation rules and make modifications to these rules where appropriate."¹⁹ Moreover, the Commission stated that "while we conclude that cost-sharing should apply to all emerging technology services, we do not adopt specific cost-sharing rules for new services at this time, but will develop such rules in future proceedings."²⁰ We recently established rules that provide for the relocation of incumbent Broadcast Auxiliary Service and Fixed Service microwave licensees from the 2 GHz band in order to clear spectrum for MSS.²¹ In doing so, we generally followed the same principles that governed the relocation of fixed microwave incumbents to clear spectrum for PCS, but in some

¹⁴ See note 11 *supra*.

¹⁵ See *id.*

¹⁶ See *id.*

¹⁷ See note 12 *supra*.

¹⁸ See MSS Coalition Petition at 2.

¹⁹ See *First Report and Order*, 11 FCC Rcd at 8870, ¶ 92. The microwave relocation rules originally were adopted in the *Emerging Technologies* proceeding and were found to apply to all emerging technology services. *Emerging Technologies First Report and Order*, 7 FCC Rcd 6886.

²⁰ See *First Report and Order*, 11 FCC Rcd at 8870, ¶ 92.

²¹ See Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by the Mobile-Satellite Service, ET Docket No. 95-18, *Second Report and Order and Second Memorandum Opinion and Order*, FCC 00-233 (released July 3, 2000) (*MSS Order*).

cases the rules we adopted for MSS reflected unique characteristics of the rollout of MSS.²² The concerns raised by the MSS Coalition on reconsideration regarding the applicability of the microwave relocation and cost-sharing rules to the 2 GHz bands allocated to MSS were raised and considered in the MSS proceeding, and further discussion here is unnecessary.

7. Petitions for Reconsideration. We also decline to reconsider or clarify the various cost-sharing rules adopted in the *First Report and Order*. For example, the Commission was petitioned to reconsider extending the 10-year period for microwave incumbent relocations,²³ raising the \$250,000 cap on reimbursable relocation costs,²⁴ and eliminating the installment payment plan for designated entity reimbursement obligations,²⁵ among other requested amendments to the rules. We find that making the requested rule changes at this time would not be in the public interest.

8. The cost-sharing rules have been in effect since 1996. They generally have served to promote an efficient and equitable relocation process, one of the goals of the *First Report and Order*.²⁶ Moreover, changing the cost-sharing rules mid-stream could undermine the integrity of the rules that PCS relocators, later-entrant PCS entities, and microwave incumbents have relied on to effect the relocation from these bands. It could lead to confusion and uncertainty among PCS entities and microwave incumbents who must comply with the modified rules. We conclude, therefore, that none of the suggested changes to the Commission's cost-sharing rules would significantly advance our goal of promoting an efficient and equitable relocation process as to outweigh the risks associated with such rule changes.

9. Similarly, we conclude that the changes to the Commission's involuntary relocation rules suggested by AT&T Wireless Services and its joint petitioners²⁷ would not significantly advance our goal of promoting an efficient and equitable relocation process as to outweigh the risks discussed above.

10. Powertel Petition for Declaratory Ruling. Powertel asserts that a chart in Appendix A of the *First Report and Order* dictates that a later-entrant PCS licensee is not obligated to reimburse a PCS relocator for the cost of relocating a link that is entirely within the PCS relocator's MTA or BTA, regardless of whether the location of the later-entrant PCS licensee's base station is within the Proximity Threshold rectangle described in Section 24.247(a) of the Commission's rules.²⁸ We disagree. We do not believe that there is an inconsistency between the chart in Appendix A of the *First Report and Order* and the Proximity

²² See, e.g., *MSS Order* at ¶ 94 (declining to maintain the right of return for relocated incumbents because of disruption to region-wide or world-wide satellite systems).

²³ See, e.g., API Petition at 5-6; UTC Petition at 5-6; Tenneco Energy Petition at 9-11.

²⁴ See API Petition at 10-11.

²⁵ See Tenneco Energy Petition at 5-6.

²⁶ See *First Report and Order*, 11 FCC Rcd at 8832, ¶ 9.

²⁷ See Joint Petition of AT&T et al. at 3. See also note 11 *supra*.

²⁸ See Powertel Petition at 1; note 12 *supra*. See also *First Report and Order*, 11 FCC Rcd 8884-85, ¶ 16; 47 C.F.R. § 24.247(a). Under Section 24.247(a), a reimbursement obligation arises when a fixed base station in a subsequent PCS licensee's network, regardless of location, falls within the Proximity Threshold rectangle described in the rule.

Threshold test adopted by the Commission in that Order.²⁹ Thus, we find that the Proximity Threshold test set forth in Section 24.247³⁰ controls when a reimbursement obligation exists for a later-entrant PCS licensee arising from the relocation of interfering links. As the Commission stated in the *First Report and Order*, the Proximity Threshold test is administratively convenient for the clearinghouses to apply and generally permits existing and prospective PCS providers to project their cost-sharing obligations accurately.³¹

B. Petitions Concerning the *Second Report and Order*

11. In this section, we consider the following issues raised in petitions for reconsideration or clarification of the *Second Report and Order*: (1) whether to permit microwave incumbents who self-relocated prior to the effective date of the *Second Report and Order* to obtain reimbursement from PCS entities under the cost-sharing plan; (2) whether to permit self-relocating microwave incumbents to collect reimbursement under the cost-sharing plan even if they relocate to leased microwave facilities rather than to purchased facilities; (3) whether the reimbursement amount to which microwave licensees are entitled under the cost-sharing formula should be subject to "depreciation;"³² (4) the deadline by which self-relocating microwave incumbents must submit documentation of a relocation to the clearinghouse; and (5) how the cost-sharing formula applies to the first PCS entity that has a cost-sharing obligation to a relocating microwave incumbent.

1. Reimbursement of Self-Relocating Microwave Incumbents for Relocations Occurring Prior to the Effective Date of the *Second Report and Order*

12. Background. Under the Commission's cost-sharing plan that was adopted in the *First Report and Order* and became effective on August 12, 1996, PCS relocators seeking reimbursement for costs incurred in relocating microwave links are permitted to register their reimbursement rights with the clearinghouse for relocation expenses incurred since April 5, 1995, the date that the voluntary negotiation period for relocation of microwave incumbents by

²⁹ Powertel relies on the chart in the *First Report and Order* to support its argument that a later-entrant PCS licensee is not obligated to reimburse a PCS relocater for the cost of relocating a link that is entirely within the PCS relocater's MTA or BTA. See Powertel Petition at 4; *First Report and Order* at Appendix A, ¶ 16. The narrow purpose of the chart was to illustrate a PCS relocater's rights to obtain reimbursement when it relocated *non-interfering links* that are *outside* its market area or licensed frequency band, for instance, as a part of the PCS relocater's effort to relocate an incumbent's entire microwave system. See *First Report and Order* at Appendix A, ¶ 16. The links relocated by the PCS relocater in the Powertel case do not fall into this category because they consist of *interfering links within* the PCS relocater's market area. As such, the *First Report and Order* chart cited by Powertel does not apply to these links. However, the Proximity Threshold test in Section 24.247(a) does.

³⁰ 47 C.F.R. § 24.247.

³¹ See *First Report and Order*, 11 FCC Rcd at 8893, Appendix A at ¶ 33.

³² For purposes of this *MO&O*, the terms "depreciation" or "depreciates" refer only to the factor in the cost sharing formula set forth in Section 24.243 that reduces the amount reimbursable to a PCS relocater or self-relocating microwave incumbent for every month that elapses between the date that the relocater or incumbent obtains reimbursement rights for that link and the date that a later entrant PCS entity incurs a reimbursement obligation for that link. See Section III.B.3 *infra*. The term is to be distinguished from "depreciation" as used in the context of accounting for the cost of a microwave incumbent's relocation, *i.e.*, depreciated cost or full replacement cost.

A and B block licensees began.³³ Under amendments to the cost-sharing plan that were adopted in the *Second Report and Order* and became effective on May 19, 1997, self-relocating microwave incumbents seeking reimbursement for costs incurred in relocating microwave links are permitted to register reimbursement rights with the clearinghouse for relocation expenses incurred prospectively from the effective date of the amended rules.³⁴ Neither the *Second Report and Order* nor the amended rules explicitly address whether self-relocating microwave incumbents are permitted to register reimbursement rights with the clearinghouse for relocation expenses incurred prior to the effective date of the amended rules.

13. On reconsideration, API, Santee Cooper, and UTC argue that microwave incumbents that self-relocated their links prior to the effective date of the *Second Report and Order* should be entitled to register reimbursement rights with the clearinghouse for expenses incurred after April 5, 1995.³⁵ These petitioners argue that such reimbursement is appropriate because microwave incumbents that relocated their own links prior to arrangements with PCS entrants helped to facilitate the Commission's goal of rapidly clearing the 1850-1990 MHz band for use by broadband PCS. In addition, these petitioners argue that such reimbursement is equitable, given the Commission's decision to permit PCS licensees to obtain reimbursement for relocation costs incurred prior to the Commission's adoption of cost-sharing in the *First Report and Order*.

14. Discussion. We decline to extend reimbursement rights to microwave incumbents that self-relocated links between April 5, 1995 and May 19, 1997 because we find that the petitioners have not demonstrated that such reimbursement is warranted. First, we note that microwave incumbents that self-relocated links during this time period should not have had any expectation that they would be reimbursed by later-entrant PCS entities because no Commission rule was in effect to permit such reimbursement. Second, microwave incumbents that self-relocated links during this time period were not obligated to do so by our rules; indeed, for most of this time period, these incumbents were not obligated to negotiate with PCS entities over relocation. Thus, it is likely that microwave incumbents that self-relocated links during this time period did so for independent business reasons, such as gaining more options for obtaining alternative spectrum or exercising more control over the relocation process, and petitioners have not demonstrated to the contrary. Even in those cases where microwave incumbents self-relocated certain links contemporaneously with other links subject to an agreement with a PCS entity, as part of a system-wide replacement, the incumbents were under no obligation to do so.³⁶

15. In addition, we are concerned about the ability of independent third party appraisers to collect reliable cost data from microwave incumbents that self-relocated links prior to May 19, 1997, sufficient to verify the actual cost of relocation to comparable facilities. The

³³ See *First Report and Order*, 11 FCC Rcd at 8887, Appendix A at ¶ 23; 47 C.F.R. § 24.245(b); 61 Fed. Reg. 29679.

³⁴ See *Second Report and Order*, 12 FCC Rcd at 2717, ¶ 25; 47 C.F.R. § 24.245; 62 Fed. Reg. 12752.

³⁵ See API Petition at 4-7; Santee Cooper Petition at 5-9; UTC Petition at 7-9. See also Southern Comments at 3-5.

³⁶ As the Commission noted in the *First Report and Order*, the Commission's microwave relocation rules adopted in ET Docket No. 92-9 protect incumbents from system disruptions by requiring PCS relocators to provide incumbents with a seamless transition from their old facilities to the replacement facilities and to pay for additional costs associated with integrating the new links into the old system. See *First Report and Order*, 11 FCC Rcd at 8845-46, ¶ 37.

Second Report and Order made clear that reliable independent verification of a microwave incumbent's relocation costs was necessary as a safeguard to determine the compensation reimbursable under the cost-sharing plan.³⁷ Petitioners have not demonstrated how or even if this safeguard could work in practice if applied retrospectively.

16. Thus, for these reasons, we find that it would not be in the public interest to grant the petitioners' request. We distinguish our decision here from our decision to permit PCS relocators to obtain reimbursement for costs incurred in relocating microwave links between April 5, 1995 and August 12, 1996, the effective date of the cost-sharing rules adopted in the *First Report and Order*.³⁸ First, PCS licensees that negotiated relocation agreements with microwave incumbents during this time period expressly did so for the purpose of clearing the 1850-1990 MHz band for use by PCS, thus facilitating this important Commission goal. Second, these agreements provide objective evidence of the negotiated costs for relocation, and thus are not subject to the difficulties in obtaining reliable cost data years after the relocation occurred, as discussed above. Third, if the Commission did not permit PCS relocators to obtain reimbursement for costs incurred in relocating microwave links during this time period, later-entrant PCS entities that benefited from the clearance of this spectrum would have received a significant competitive advantage against PCS relocators in the market.

2. Reimbursement of Self-Relocating Microwave Incumbents for Relocations to Leased Facilities

17. Background. The Commission's microwave relocation cost-sharing formula, set forth in Section 24.243 of the Commission's rules, allocates reimbursement to PCS relocators or self-relocating microwave incumbents based on the actual costs of relocation, subject to certain factors.³⁹ Section 24.243(b) of the Commission's rules lists "leased facilities" as an actual relocation cost to be included in the cost-sharing formula.⁴⁰ API encourages the Commission to permit self-relocation to leased facilities because it will encourage prompt clearing of the 1850-1990 MHz band.⁴¹

18. Discussion. We clarify that the cost-sharing formula set forth in Section 24.243 permits either PCS relocators or self-relocating microwave incumbents to include the actual costs of leasing replacement facilities as a compensable cost under the formula. We believe that self-relocating microwave incumbents and PCS relocators should be able to choose the most efficient method of relocation, whether it involves the purchase of replacement facilities or the leasing of replacement facilities. Although this clarification is opposed by PCIA and UTAM,⁴² we find that PCIA and UTAM have not adequately explained why self-relocating microwave incumbents should be treated differently than PCS relocators on this issue. We also do not agree with the contention of PCIA and UTAM that the costs of microwave incumbents relocating to leased

³⁷ See *Second Report and Order*, 12 FCC Rcd at 2718, ¶ 28.

³⁸ See *First Report and Order*, 11 FCC Rcd at 8887-8, Appendix A at ¶23; 61 Fed. Reg. 29679.

³⁹ See 47 C.F.R. § 24.243.

⁴⁰ See 47 C.F.R. § 24.243(b).

⁴¹ See API Petition at 7-8.

⁴² See PCIA Opposition at 8-9; UTAM Opposition at 5-6.

facilities will be difficult to verify.⁴³ If either a microwave incumbent or a PCS relocater submits relocation costs based on leased facilities, the clearinghouse can determine whether the leased facilities represent comparable facilities and can calculate the present value of the lease payments. In addition, such relocation costs are subject to independent verification by a third party appraiser⁴⁴ and to the monetary caps established by the Commission.⁴⁵

3. Depreciation of Amount Reimbursable to Self-Relocating Microwave Incumbents

19. **Background.** The reimbursement obligation of later-entrant PCS entities that is derived from the cost-sharing formula adopted in the *First Report and Order* decreases over a ten-year period, so that the amount that the PCS relocater receives in reimbursement is reduced, *i.e.*, depreciates, over time.⁴⁶ Thus, with the exception of the “full reimbursement” category described below, the PCS relocater’s reimbursement for a given link is reduced for every month that elapses between the date that the PCS relocater obtains reimbursement rights for that link and the date that a later-entrant PCS entity incurs a reimbursement obligation for that link.⁴⁷ The PCS relocater obtains reimbursement rights on the date it signs an agreement with a microwave incumbent for the relocation of the link.⁴⁸ The Commission stated in the *First Report and Order* that this decrease in reimbursement over time reflects the fact that the PCS relocater has received the benefit of being first to market, and to ensure that the PCS relocater pays the largest amount, which would provide an incentive to the relocater to limit relocation expenses.⁴⁹ The Commission also determined, though, that PCS relocators should be entitled to full reimbursement, not subject to depreciation, for relocating non-interfering links that are either fully outside their market area (*e.g.*, MTA, BTA) or their licensed frequency band (*e.g.*, A block, B block).⁵⁰ The rationale for this exception to the application of the depreciation factor is to provide further incentive for a PCS relocater to relocate an entire system of a microwave incumbent, rather than singling out links that interfere solely with the PCS relocater’s own operations.⁵¹

20. In the *Second Report and Order*, the Commission determined that the reimbursement of self-relocating microwave incumbents should be subject to depreciation.⁵² The Commission explained that depreciation ensures that incumbents pay for benefits that result from

⁴³ See PCIA Opposition at 9; UTAM Opposition at 6.

⁴⁴ See *Second Report and Order*, 12 FCC Rcd at 2718, ¶ 28.

⁴⁵ See *id.* at 2717, ¶ 26; *First Report and Order*, 11 FCC Rcd at 8862, ¶ 74.

⁴⁶ See *First Report and Order*, 11 FCC Rcd at 8880, Appendix A at ¶ 8; 47 C.F.R. § 24.243. See also note 32 *supra* for an explanation of “depreciation” in this context.

⁴⁷ See 47 C.F.R. § 24.243(d).

⁴⁸ See *id.*

⁴⁹ See *First Report and Order*, 11 FCC Rcd at 8862, ¶ 74.

⁵⁰ See *id.* at 8884, Appendix A at ¶ 16.

⁵¹ See Amendment to the Commission’s Rules Regarding a Plan for Sharing the Costs of Microwave Relocation, WT Docket No. 95-157, RM-8643, *Notice of Proposed Rulemaking*, 11 FCC Rcd 1923, 1937-38, ¶ 32 (1995) (*Notice*); *First Report and Order*, 11 FCC Rcd at 8884, Appendix A at ¶ 16.

⁵² See *Second Report and Order*, 12 FCC Rcd at 2718, ¶ 27.

early relocation on a voluntary basis: more options for obtaining alternative spectrum; more control over the relocation process; and reduced uncertainty about further operations. The Commission also concluded that the application of a depreciation factor to the reimbursement formula for self-relocating microwave incumbents provides an incentive for the incumbent to minimize costs because its own share of the costs is not depreciated.

21. Petitioners challenge the Commission's decision to depreciate the amount reimbursable to a self-relocating microwave incumbent under the cost-sharing formula, arguing that incumbents have other incentives to minimize relocation costs, that incumbents do not receive the same type of "first-to-market" benefits that PCS relocators receive, and that Commission's decision treats microwave incumbents differently than PCS relocators.⁵³

22. Discussion. We find that the petitioners do not raise any arguments that warrant our reconsideration of the decision in the *Second Report and Order* to depreciate the amount reimbursable to a self-relocating microwave incumbent under the cost-sharing formula.⁵⁴ Under the Commission's cost-sharing plan, depreciation applies equally to reimbursement of self-relocating microwave incumbents and to reimbursement of PCS relocators, except for PCS relocators that move non-interfering links that are either fully outside their market area or their licensed frequency band. As discussed above, the rationale for applying depreciation to reimbursement under the cost-sharing formula is the same for both self-relocating microwave incumbents and PCS relocators. Both receive benefits from the costs they incur for early relocations that should reduce reimbursement obligations of later-entrant PCS entities: microwave incumbents, for example, gain more options for obtaining alternative spectrum; and PCS relocators are the first to market. Moreover, both self-relocating microwave incumbents and PCS relocators are in a position to minimize relocation costs.

23. Although the Commission did permit PCS relocators that relocate out-of-market or out-of-band links to receive full reimbursement, not subject to depreciation, that exception reflects an analysis by the Commission that such PCS relocators need additional incentive to relocate these links.⁵⁵ The Commission did not find in the *Second Report and Order* that such additional incentives were necessary for microwave incumbents to self-relocate links, and we see no reason to reconsider that decision here.

24. We do, however, amend Section 24.243(d) of our rules to clarify the date on which the depreciation factor begins to apply to the amount reimbursable to a self-relocating microwave incumbent under the cost-sharing formula. As discussed above, the amount reimbursable to a PCS relocator under the cost-sharing formula begins to depreciate on the date that the relocator signs an agreement with the microwave incumbent.⁵⁶ In the *First Report and Order*, the Commission found that the use of the signed agreement date was easily verifiable.⁵⁷ In the case of a self-relocating microwave incumbent, the self-relocating incumbent is, by definition, relocating before the existence of an agreement with a PCS relocator.

⁵³ See API Petition at 9-11; Santee Cooper Petition at 9-12; UTC Petition at 2-5.

⁵⁴ See *Second Report and Order*, 12 FCC Rcd at 2718, ¶ 27.

⁵⁵ See *First Report and Order*, 11 FCC Rcd at 8884, Appendix A at ¶ 16; *Notice*, 11 FCC Rcd at 1937-38, ¶ 32.

⁵⁶ See paragraph 19 *supra*; 47 C.F.R. § 24.243(d).

⁵⁷ See *First Report and Order*, 11 FCC Rcd at 8882, ¶ 10.

25. We find that, in the case of a self-relocating microwave incumbent seeking reimbursement for the relocation of links in the 1850-1990 MHz band, a reasonable substitute for the signed agreement date is the date that the incumbent notifies the Commission that it intends to discontinue, or has discontinued, the use of these links, pursuant to Section 101.305 of the Commission's rules.⁵⁸ We find that, similar to a signed agreement date, this date is easily verifiable and thus will not result in significant administrative burden for self-relocating incumbents or the clearinghouses. We also find that this date can be applied to incumbent relocations to microwave networks or wireline networks (*e.g.*, fiber optic) because in either case the incumbent must notify the Commission of the discontinuance of its displaced facilities under Section 101.305.⁵⁹ We note that the use of this date is supported by ITA,⁶⁰ and that no party has challenged its use in the record.

26. Thus, we conclude that the date that the depreciation factor begins to apply to the amount reimbursable to a microwave incumbent for its self-relocated links is the date that the incumbent notifies the Commission that it intends to discontinue, or has discontinued, the use of these links, pursuant to Section 101.305 of the Commission's rules.⁶¹ We emphasize that the obtainment of reimbursement rights by a fixed microwave incumbent is contingent upon the incumbent's compliance with Section 101.305 of the Commission's rules. We amend Section 24.243(d) of the Commission's rules accordingly. We also make a related amendment to Section 24.245(a)(2) of the Commission's rules in Section III.B.4 below, regarding when a self-relocating microwave incumbent must submit documentation of the relocation to the clearinghouse.

4. Deadline for Self-Relocating Microwave Incumbents to Submit Documentation of a Relocation to the Clearinghouse

27. Background. Under Section 24.245(a)(2) of the Commission's rules, a self-relocating microwave incumbent seeking reimbursement must submit documentation to the clearinghouse within ten business days of the date that "relocation occurs."⁶² The rule does not define when relocation occurs. In the case of a PCS relocater seeking reimbursement, relocation occurs (*i.e.*, the PCS relocater obtains reimbursement rights) on the date that the relocater signs an agreement with an incumbent for the relocation of the incumbent's links.⁶³

⁵⁸ See 47 C.F.R. § 101.305. Under Section 101.305(b), an incumbent subject to regulation under Title II of the Communications Act is required to obtain authorization from the Commission before voluntarily discontinuing service. Under Section 101.305(c), an incumbent not subject to Title II regulation may voluntarily discontinue service without prior authorization, but must notify the Commission within seven days of doing so.

⁵⁹ In contrast, the date that the incumbent files an application for new facilities would not encompass incumbent relocations to wireline networks because under Section 63.01 of the Commission's rules, construction of new domestic transmission lines does not require prior authorization from the Commission, unless the transmission will use radio frequencies or the construction would have a significant effect on the environment as detailed in Section 1.1307 of the Commission's rules. See 47 C.F.R. §§ 63.01, 1.1307.

⁶⁰ See Letter from Mark E. Crosby, Industrial Telecommunications Association, Inc., to David Furth, FCC, dated June 10, 1997, at 8.

⁶¹ See 47 C.F.R. § 101.305.

⁶² See 47 C.F.R. § 24.245(a)(2).

⁶³ See 47 C.F.R. § 24.245(a)(1).

28. Discussion. Microwave incumbents request that the Commission clarify whether the relocation of a self-relocating microwave incumbent occurs on the date that the incumbent's links are decommissioned, the date that the replacement facilities are fully implemented, or some other date.⁶⁴ In Section III.B.3 above, we found that depreciation begins to apply to the amount reimbursable to a microwave incumbent for its self-relocated links on the date that the incumbent notifies the Commission that it intends to discontinue, or has discontinued, the use of these links, pursuant to Section 101.305 of the Commission's rules.⁶⁵ We see no reason why this date should not also serve as the date that triggers the obligation of the incumbent to file documentation with a clearinghouse. The date that the relocation agreement is signed serves as the date that triggers a PCS relocater's obligation to submit documentation to the clearinghouse and the date when the depreciation factor begins to apply to the amount reimbursable to a PCS relocater.⁶⁶ Thus, we find that in order to obtain reimbursement for the relocation of links in the 1850-1990 MHz band, a self-relocating microwave incumbent must submit documentation of the relocation to the clearinghouse within ten business days of the date that the incumbent notifies the Commission that it intends to discontinue, or has discontinued, the use of these links, pursuant to Section 101.305 of the Commission's rules.⁶⁷ We modify Section 24.245(a)(2) accordingly.

5. The "N" Variable in the Cost-Sharing Formula

29. Background. Under the Commission's cost-sharing formula, the amount of reimbursement owed to the PCS relocater or self-relocating microwave incumbent by later-entrant PCS entities is calculated by: (1) determining the actual costs of reimbursement; (2) dividing by the variable "N," which represents the number of PCS entities that would have interfered with the incumbent's link; and (3) applying a depreciation factor.⁶⁸ Under Section 24.243(c) of the Commission's rules, N equals 1 for the PCS relocater, N equals 2 for the next PCS entity that would have interfered with the link, and so on.⁶⁹

30. Discussion. As requested by API and UTC, we clarify that when the cost-sharing formula is applied in the case of a self-relocating microwave incumbent, N equals 1 for the first PCS entity that would have interfered with the relocated link, and we amend Section 24.243(c) accordingly.⁷⁰ If N were to equal 2 when the cost-sharing formula is applied to the case of a self-relocating microwave incumbent, the incumbent's reimbursement would be reduced by half, a result that is inconsistent with the Commission's goal of encouraging self-relocation. We note that no party opposes this clarification.

⁶⁴ See API Petition at 5 n.2; Southern Company Comments at 5; UTC Comments at 7-8.

⁶⁵ See 47 C.F.R. § 101.305.

⁶⁶ See 47 C.F.R. §§ 24.243(d), 24.245(a).

⁶⁷ See 47 C.F.R. § 101.305. See note 58 *supra*.

⁶⁸ See 47 C.F.R. § 24.243.

⁶⁹ See 47 C.F.R. § 24.243(c).

⁷⁰ See API Petition at 11-12; UTC Petition at 6-7.

IV. CONCLUSION

31. As discussed above, in this *MO&O* we clarify that: (1) the Proximity Threshold test set forth in Section 24.247 of the Commission's rules controls when a reimbursement obligation exists for a later-entrant PCS licensee; (2) microwave incumbents that self-relocated links between April 5, 1995 and May 19, 1997 are not entitled to reimbursement; (3) microwave incumbents are permitted to relocate to leased facilities, as well as purchased facilities; (4) the date that the depreciation factor begins to apply to the amount reimbursable to a microwave incumbent for its self-relocated links is the date that the incumbent notifies the Commission that it intends to discontinue, or has discontinued, the use of these links, pursuant to Section 101.305 of the Commission's rules; (5) the deadline for self-relocating microwave incumbents to file documentation of the relocation with the clearinghouse shall be within ten business days of the date referred to in the preceding clause; and (6) under the cost-sharing formula as applied to self-relocating microwave incumbents, the variable N equals 1 for the first PCS entity that would have interfered with the relocated link. We deny the remaining requests in the petitions for reconsideration and/or clarification of the *First Report and Order* and *Second Report and Order* in this proceeding.

V. PROCEDURAL MATTERS

A. Regulatory Flexibility Act

32. Appendix C contains a Supplemental Final Regulatory Flexibility Analysis, in accordance with the Regulatory Flexibility Act.⁷¹

B. Paperwork Reduction Act

33. This *MO&O* contains no new or modified information collections subject to the Paperwork Reduction Act of 1995, Public Law 104-13.

VI. ORDERING CLAUSES

34. Accordingly, IT IS ORDERED, pursuant to Section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, that the petitions for reconsideration and/or clarification of the *First Report and Order* filed by the American Petroleum Institute, the Association of American Railroads, the Association of Public-Safety Communications Officials-International, Inc., AT&T Wireless Services, Inc. (jointly with GTE Mobilnet, PCS PrimeCo, L.P., Pocket Communications, Inc., Western PCS Corporation and the Cellular Telecommunications Industry Association), the MSS Coalition, Omnipoint Communications, Inc., the Personal Communications Industry Association, Small Business in Telecommunications, Tenneco Energy, and UTC/The Telecommunications Association ARE DENIED, as discussed in Section III.A *supra*.

35. IT IS FURTHER ORDERED, pursuant to Section 1.2 of the Commission's rules, 47 C.F.R. § 1.2, that the petition for declaratory ruling concerning the *First Report and Order* filed by Powertel PCS, Inc. IS DENIED, as discussed in Section III.A *supra*.

⁷¹ See 5 U.S.C. § 601 *et seq.*

36. IT IS FURTHER ORDERED, pursuant to Section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, that the petitions for reconsideration and/or clarification of the *Second Report and Order* filed by American Petroleum Institute, UTC/The Telecommunications Association, and the South Carolina Public Service Authority ARE GRANTED IN PART and DENIED IN PART, as discussed in Section III.B *supra*.

37. IT IS FURTHER ORDERED that Sections 24.243 and 24.245 of the Commission's rules, 47 C.F.R. §§ 24.243, 24.245, ARE AMENDED as set forth in Appendix B, effective 30 days after publication in the Federal Register.

38. IT IS FURTHER ORDERED that the Commission's Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of this Memorandum Opinion and Order on Reconsideration, including the Supplemental Final Regulatory Flexibility Analysis set forth in Appendix C, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION



Magalie Roman Salas
Secretary

APPENDIX A

LIST OF PETITIONS, COMMENTS, AND REPLIES

First Report and OrderPetitions for Reconsideration, Clarification, and/or Rulemaking
(received July 12, 1996, unless otherwise noted)

American Petroleum Institute (API)
Association of American Railroads
Association of Public-Safety Communications Officials-International, Inc. (APCO)
AT&T Wireless Services, Inc.; GTE Mobilnet; PCS PrimeCo, L.P.; Pocket Communications, Inc.; Western PCS Corporation; and Cellular Telecommunications Industry Association (AT&T et al.)
Celsat America, Inc., COMSAT Corporation, Hughes Space and Communications International, ICO Global Communications, and Personal Communications Satellite Corporation (collectively, the MSS Coalition)
Omnipoint Communications, Inc. (Omnipoint)
Small Business in Telecommunications (May 28, 1996)
Personal Communications Industry Association (PCIA)
Tenneco Energy
UTC, the Telecommunications Association (UTC)

Comments/Oppositions (received August 8, 1996)

American Petroleum Institute (API)
Association of American Railroads
Association of Public-Safety Communications Officials-International, Inc. (APCO)
AT&T Wireless Services, Inc.
Omnipoint Communications, Inc.
Pacific Bell Mobile Services
Personal Communications Industry Association (PCIA)
UTC, the Telecommunications Association (UTC)

Replies (received August 19, 1996, unless otherwise noted)

American Petroleum Institute (API)
Association of American Railroads
AT&T Wireless Services, Inc.; GTE Mobilnet; PCS PrimeCo, L.P.; Pocket Communications, Inc.; Western PCS Corporation; and the Cellular Telecommunications Industry Association (AT&T et al.) (August 21, 1996)
MSS Coalition (August 21, 1996)
Omnipoint Communications, Inc. (Omnipoint)
Personal Communications Industry Association (PCIA)
Tenneco Energy

Petition for Declaratory Ruling (received September 26, 1997)

Powertel PCS, Inc.

Response to Petition for Declaratory Ruling (received October 24, 1997)

PCIA Microwave Clearinghouse

Second Report and Order

Petitions for Reconsideration and/or Clarification
(received April 17, 1997, unless otherwise noted)

American Petroleum Institute (API) (April 16, 1997)
South Carolina Public Service Authority (Santee Cooper)
UTC, the Telecommunications Association (UTC)

Comments/Oppositions (received May 20, 1997)

Pacific Bell Mobile Services
Personal Communications Industry Association (PCIA)
Southern Company
UTAM, Inc.
UTC, the Telecommunications Association (UTC)

Replies (received May 30, 1997, unless otherwise noted)

American Petroleum Institute (API)
Personal Communications Industry Association (PCIA)
South Carolina Public Service Authority (Santee Cooper) (June 4, 1997)
UTAM, Inc.

APPENDIX B

FINAL RULES

Part 24 of Title 47 of the Code of Federal Regulations is amended as follows:

1. Section 24.243 is amended by revising subsections (c) and (d) as follows:

§ 24.243 The cost-sharing formula.

* * * * *

- (c) N equals the number of PCS entities that would have interfered with the link. For the PCS relocater, $N = 1$. For the next PCS entity that would have interfered with the link, $N = 2$, and so on. In the case of a voluntarily relocating microwave incumbent, $N=1$ for the first PCS entity that would have interfered with the link. For the next PCS entity that would have interfered with the link, $N = 2$, and so on.
- (d) T_m equals the number of months that have elapsed between the month the PCS relocater or voluntarily relocating microwave incumbent obtains reimbursement rights for the link and the month that the clearinghouse notifies a later-entrant of its reimbursement obligation for the link. A PCS relocater obtains reimbursement rights for the link on the date that it signs a relocation agreement with a microwave incumbent. A voluntarily relocating microwave incumbent obtains reimbursement rights for the link on the date that the incumbent notifies the Commission that it intends to discontinue, or has discontinued, the use of the link, pursuant to Section 101.305 of the Commission's rules, 47 C.F.R. § 101.305.

2. Section 24.245 is amended by revising subsection (a)(2) as follows:

§ 24.245 Reimbursement under the Cost-Sharing Plan.

(a) * * *

- (2) To obtain reimbursement, a voluntarily relocating microwave incumbent must submit documentation of the relocation of the link to the clearinghouse within ten business days of the date that the incumbent notifies the Commission that it intends to discontinue, or has discontinued, the use of the link, pursuant to Section 101.305 of the Commission's rules, 47 C.F.R. § 101.305.

* * * * *

APPENDIX C

SUPPLEMENTAL FINAL REGULATORY FLEXIBILITY ANALYSIS

1. As required by the Regulatory Flexibility Act (RFA), *see* 5 U.S.C. § 603,¹ an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Notice of Proposed Rulemaking (*Notice*) in WT Docket No. 95-157.² The Commission sought written public comment on the proposals in the *Notice*, including the IRFA. A Final Regulatory Flexibility Analysis (FRFA) was incorporated in the *First Report and Order* in WT Docket No. 95-157.³ The *First Report and Order* also included a Further Notice of Proposed Rulemaking (*Further Notice*), and thus incorporated an IRFA on the additional proposals in the *Further Notice*.⁴ The Commission sought written public comment on the additional proposals in the *Further Notice*, including the IRFA. A FRFA on the additional proposals in the *Further Notice* was incorporated in the *Second Report and Order* in WT Docket No. 95-157.⁵ This present Supplemental Final Regulatory Flexibility Analysis in this *Memorandum Opinion and Order on Reconsideration* (*MO&O*) supplements the FRFAs in the *First Report and Order* and *Second Report and Order*, and conforms to the RFA, as amended.

I. Need for, and Objectives of, the Rules

2. This *MO&O* addresses petitions for reconsideration and/or clarification of, and a petition for declaratory ruling concerning, the Commission's plan for PCS market entrants to share the costs of relocating microwave facilities from the 1850-1990 MHz band. Under the Commission's cost-sharing plan, PCS licensees and manufacturers of unlicensed PCS devices that incur costs for relocating an interfering microwave link (together, "PCS relocators") are eligible to receive reimbursement from later-entrant PCS licensees or later-entrant manufacturers of unlicensed PCS devices that benefit from the clearing of their spectrum (together, "later-entrant PCS entities").⁶ In addition, the cost-sharing plan permits microwave incumbents who relocate their own microwave links and pay their own relocation expenses ("self-relocating microwave incumbents") to collect reimbursement from later-entrant PCS entities that benefit from the clearing of the spectrum, subject to certain conditions.⁷ This *MO&O* clarifies certain aspects of this cost-sharing plan, as discussed in Section IV below, and denies the remaining

¹ See 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

² See Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation, WT Docket No. 95-157, RM-8643, *Notice of Proposed Rulemaking*, 11 FCC Rcd 1923 (1995) (*Notice*).

³ See Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation, WT Docket No. 95-157, RM-8643, *First Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 8825, 8872-73, ¶¶ 101-105 (1996) (*First Report and Order*).

⁴ See *id.* at 8870-72, ¶¶ 93-99, Appendix D.

⁵ See Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation, WT Docket No. 95-157, RM-8643, *Second Report and Order*, 12 FCC Rcd 2705, 2728-31 (1997) (*Second Report and Order*).

⁶ See *First Report and Order*, 11 FCC Rcd at 8861-67, ¶¶ 71-85.

⁷ See *Second Report and Order*, 12 FCC Rcd 2717-18, ¶¶ 25-28.

requests in the petitions, including a request to eliminate the installment payment plan for designated entity reimbursement obligations. These clarifications will facilitate the efficient relocation of fixed microwave incumbents from the 1850-1990 MHz band in order to clear the band for the provision of PCS service.

3. In particular, the *MO&O* clarifies that: (1) the Proximity Threshold test set forth in Section 24.247 of the Commission's rules, 47 C.F.R. § 24.247, controls when a reimbursement obligation exists for a later-entrant PCS licensee; (2) microwave incumbents that self-relocated links between April 5, 1995 and May 19, 1997 are not entitled to reimbursement; (3) microwave incumbents are permitted to relocate to leased facilities, as well as purchased facilities; (4) the date that the depreciation factor begins to apply to the amount reimbursable to a microwave incumbent for its self-relocated links is the date that the incumbent notifies the Commission that it intends to discontinue, or has discontinued, the use of these links, pursuant to Section 101.305 of the Commission's rules, 47 C.F.R. § 101.305; (5) the deadline for self-relocating microwave incumbents to file documentation of the relocation with the clearinghouse shall be within ten business days of the date referred to in the preceding clause; and (6) under the cost-sharing formula as applied to self-relocating microwave incumbents, the variable N equals 1 for the first PCS entity that would have interfered with the relocated link.

II. Summary of Issues Raised in Response to the FRFAs

4. None of the petitions filed on the *First Report and Order* and *Second Report and Order*, or comments filed on these petitions, were specifically in response to the FRFAs in those orders. Several of the petitions and comments regarding the *First Report and Order*, though, raised issues that may impact small entities, and were considered by the Commission, as discussed in Section V below. In particular, Tenneco Energy argues that the Commission should eliminate the payment plan that permits PCS providers that are designated entities (a small business classification used for Commission spectrum auctions) to make reimbursement payments in installments over time, as set forth in Section 24.249(b) of the Commission's rules.⁸ Omnipoint and PCIA oppose Tenneco's argument.⁹ Moreover, Omnipoint contends that, although it does not qualify as a designated entity under the Commission's rules, it should be permitted to make reimbursement payments according to the installment plan schedule set forth in Section 24.249(b).¹⁰

5. Small Business in Telecommunications (SBT) argues that the Commission should refine its definitions of communications throughput and network reliability in evaluating whether a microwave incumbent's new system is comparable to the old one, and that the Commission should require PCS providers to compensate microwave incumbent's for internal resources

⁸ See Petition for Clarification and Partial Reconsideration of the *First Report and Order* in WT Docket No. 95-157, filed by Tenneco Energy, July 12, 1996, at 5-6; 47 C.F.R. §§24.249(b).

⁹ See Comments of the Personal Communications Industry Association on Petitions for Reconsideration of the *First Report and Order* in WT Docket No. 95-157, filed August 8, 1996, at 4-5; Opposition of Omnipoint Communications, Inc. to Petitions for Reconsideration of the *First Report and Order* in WT Docket No. 95-157, filed August 8, 1996, at 4-5 (Omnipoint Opposition).

¹⁰ See Petition for Reconsideration and Clarification of the *First Report and Order* in WT Docket No. 95-157, filed by Omnipoint Communications, Inc., July 12, 1996, at 2-4.

devoted to the relocation process.¹¹ Other fixed microwave incumbents, such as the Association of American Railroads, support a refinement of the definitions of throughput and reliability,¹² whereas PCS providers such as AT&T, Omnipoint, and Pacific Bell, oppose such a refinement.¹³ In addition, AT&T opposes SBT's suggested modification to include internal resources in compensation.¹⁴

III. Description and Estimate of the Number of Small Entities to Which the Rules Will Apply

6. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.¹⁵ The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."¹⁶ In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.¹⁷ A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).¹⁸ A small organization is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."¹⁹ Nationwide, as of 1992, there were approximately 275,801 small organizations.²⁰ "Small governmental jurisdiction"²¹ generally means "governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than 50,000."²² As of 1992, there were approximately 85,006 such jurisdictions in the United States.²³ This

¹¹ See Petition for Reconsideration of the *First Report and Order* in WT Docket No. 95-157, filed by Small Business in Telecommunications, May 28, 1996.

¹² See, e.g., Petition for Partial Clarification and Reconsideration of the *First Report and Order* in WT Docket No. 95-157, filed by the Association of American Railroads, July 12, 1996, at 7-8.

¹³ See, e.g., Opposition of AT&T Wireless Services, Inc. to Petitions for Reconsideration of the *First Report and Order* in WT Docket No. 95-157, filed August 8, 1996, at 6-7 (AT&T Opposition); Omnipoint Opposition at 6-7; Opposition of Pacific Bell Mobile Services to Petitions for Reconsideration of the *First Report and Order* in WT Docket No. 95-157, filed August 8, 1996, at 5-6.

¹⁴ AT&T Opposition at 7-8.

¹⁵ 5 U.S.C. § 603(b)(3).

¹⁶ 5 U.S.C. § 601(6).

¹⁷ 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632). Pursuant to the RFA, the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register." *Id.*

¹⁸ Small Business Act, 15 U.S.C. § 632 (1996).

¹⁹ 5 U.S.C. § 601(4).

²⁰ 1992 Economic Census, U.S. Bureau of the Census, Table 6 (special tabulation of data under contract to Office of Advocacy of the U.S. Small Business Administration).

²¹ 47 C.F.R. § 1.1162.

²² 5 U.S.C. § 601(5).

²³ U.S. Dept. of Commerce, Bureau of the Census, "1992 Census of Governments."

number includes 38,978 counties, cities, and towns; of these, 37,566, or 96 percent, have populations of fewer than 50,000.²⁴ The Census Bureau estimates that this ratio is approximately accurate for all governmental entities. Thus, of the 85,006 governmental entities, we estimate that 81,600 (96 percent) are small entities. Below, we further describe and estimate the number of small entity licensees and regulatees that will be affected by the rule clarifications adopted in this *MO&O*.

7. The rule clarifications adopted in this *MO&O* will affect small entities that participate in the microwave relocation process in the 1850 MHz to 1990 MHz band: providers of broadband personal communications service (PCS); providers of fixed microwave services; and manufacturers of unlicensed PCS devices.

8. Broadband Personal Communications Service (PCS). The broadband PCS spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission defined "small entity" for Blocks C and F as an entity that has average gross revenues of less than \$40 million in the three previous calendar years.²⁵ For Block F, an additional classification for "very small business" was added and is defined as an entity that, together with their affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.²⁶ These regulations defining "small entity" in the context of broadband PCS auctions have been approved by the SBA.²⁷ No small businesses within the SBA-approved definition bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 small and very small business bidders won approximately 40% of the 1,479 licenses for Blocks D, E, and F.²⁸ However, licenses for Blocks C through F have not been awarded fully; therefore, there are few, if any, small businesses currently providing PCS services. Based on this information, we estimate that the number of small broadband PCS licensees will include the 90 winning C Block bidders and the 93 qualifying bidders in the D, E, and F blocks, for a total of 183 small entity PCS providers as defined by the SBA and the Commission's auction rules.

9. Fixed Microwave Services. The Commission has not yet defined a small business with respect to microwave services. For purposes of this IRFA, we will utilize the SBA's definition applicable to radiotelephone companies -- *i.e.*, an entity with no more than 1,500 persons.²⁹ The Commission's Office of Engineering and Technology developed a study in 1992 that provides statistical data for all microwave incumbents in 1850 to 1990 MHz band.³⁰

²⁴ *Id.*

²⁵ See Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, *Report and Order*, WT Docket No. 96-59, 11 FCC Rcd 7824, 7850-52, ¶¶ 57-60 (1996) (*Spectrum Cap Report and Order*), 61 Fed. Reg. 33859 (Jul. 1, 1996); see also 47 CFR § 24.720(b).

²⁶ See *Spectrum Cap Report and Order*, 11 FCC Rcd at 7852, ¶ 60.

²⁷ See, e.g., Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, *Fifth Report and Order*, 9 FCC Rcd 5532, 5581-84 (1994).

²⁸ FCC News, "Broadband PCS, D, E and F Block Auction Closes," No. 71744 (released Jan. 14, 1997).

²⁹ 13 C.F.R. § 121.201, Standard Industrial Classification (SIC) 4812.

³⁰ See "Creating New Technology Bands for Emerging Telecommunications Technology," OET/TS 92-1 (January 1992).

Specifically, the study finds that in the 1850 MHz to 1990 MHz band, local governments, including public safety entities, have 168 licenses; petroleum companies have 67 licenses; power companies have 164 licenses; railroad companies have 18 licenses; and all other microwave incumbents in this band have 143 licenses.³¹ However, the Commission does not have specific statistics that determine how many of these companies are small businesses. We therefore are unable to estimate the number of fixed microwave service providers that qualify under the SBA's definition.

10. Manufacturers of Unlicensed PCS Devices. The Commission has not yet developed a definition of small entities applicable to manufacturers of unlicensed PCS devices. Therefore, the applicable definition of small entity is the definition under the SBA applicable to the "Communications Services, Not Elsewhere" category -- an entity with less than \$11.0 million in annual receipts.³² The Census Bureau estimate indicate that of the 848 firms in the "Communications Services, Not Elsewhere" category, 775 are small businesses. The Commission does not have specific statistics, though, on how many of these 775 small businesses are manufacturers of unlicensed PCS devices.

IV. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

11. This *MO&O* does not contain any additional reporting or recordkeeping requirements. The *MO&O* does clarify several aspects of the Commission's cost-sharing plan for microwave relocation, as discussed in Section I above, but these clarifications do not create new compliance obligations.

V. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

12. This *MO&O* clarifies certain aspects of the Commission's plan for PCS market entrants to share the costs of relocating microwave facilities from the 1850-1990 MHz band, as discussed in Section I above. Under the Commission's cost-sharing plan, PCS relocators³³ and self-relocating fixed microwave incumbents that pay for the relocation of microwave links are entitled to reimbursement from later-entrant PCS entities³⁴ that benefit from the clearing of the spectrum. A number of the clarifications set forth in this *MO&O* will affect the amount of reimbursement that a PCS relocater or self-relocating microwave incumbent is entitled to receive under the plan and, conversely, the amount of reimbursement that a later-entrant PCS entity is obligated to pay. In some cases, the clarifications will result in an increase in reimbursement, to the benefit of the PCS relocater or self-relocating microwave incumbent; in other cases, the clarifications will result in a decrease in reimbursement, to the benefit of the later-entrant PCS entity. Because some entities on both sides of the reimbursement equation are small businesses, we do not believe that, on the whole, these clarifications to the cost-sharing plan will have a

³¹ *Id.* at 8.

³² 13 C.F.R. § 121.201, SIC Code 4899.

³³ PCS relocators can be broadband PCS providers or manufacturers of unlicensed PCS devices.

³⁴ Later-entrant PCS entities can be broadband PCS providers or manufacturers of unlicensed PCS devices.

significant economic impact on small businesses. We do believe that these clarifications will make it easier for the affected regulated entities to comply with our cost-sharing rules and, to some extent, reduce the staff resources needed to handle compliance, a result that is especially beneficial for small businesses.

13. The *MO&O* also denies the remaining requests in the petitions (retaining the status quo), including the requests by Tenneco, Omnipoint, and SBT set forth in Section II above. We believe that the remaining requests would require changes in the cost-sharing rules that might undermine the integrity of the rules that PCS relocators, later-entrant PCS entities, and microwave incumbents have relied on since 1996 to effect the relocation from these bands. Thus, as discussed in paragraph 8 of the *MO&O*, we conclude that granting these remaining requests would not significantly advance our goal of promoting an efficient and equitable relocation process as to outweigh the risks associated with such rule changes.

Report to Congress. The Commission will send a copy of this *MO&O*, including this Supplemental FRFA, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, *see* 5 U.S.C. § 801(a)(1)(A). In addition, the Commission will send a copy of this *MO&O*, including this Supplemental FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of this *MO&O* and this Supplemental FRFA (or summaries thereof) will also be published in the Federal Register. *See* 5 U.S.C. § 604(b).